DISTRICT OF COLUMBIA
DOH Office of Adjudication and Hearings
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DISTRICT OF COLUMBIA DEPARTMENT OF HEALTH Petitioner, v. AGAPE, CABBAGE PATCH & LEMAE'S EARLY LEARNING CHILD DEVELOPMENT CENTER and FRANCERIS PROCTOR Respondents	Case No.: I-00-40362

DISTRICT OF COLUMBIA DEPARTMENT OF HEALTH Petitioner, v. AGAPE, CABBAGE PATCH & LEMAE'S EARLY LEARNING CHILD DEVELOPMENT CENTER and FRANCERIS PROCTOR Respondents	Case No.: I-00-40321

FINAL ORDER
AND ORDER DENYING RESPONDENTS' MOTION TO DISMISS

I. Introduction

These cases arise under the Civil Infractions Act of 1985 (D.C. Code §§ 6-2701 *et seq.* (1981 ed.)) and Title 29 Chapter 3 of the District of Columbia Municipal Regulations ("DCMR"). These cases present a somewhat complex procedural history which is necessary to recount for purposes of this disposition.

A. Notice of Infraction (00-40362)

By Notice of Infraction (00-40362) served March 2, 2001, the Government charged Respondents Agape Cabbage Patch & LeMae's Early Learning Child Development Center ("Agape") and Franceris Proctor with violations of 29 DCMR 311.1 for allegedly prohibiting the inspection of a licensed child development facility, and 29 DCMR 316.1 for allegedly exceeding child group size limitations. The Notice of Infraction charged that these violations occurred on January 25, 2001 at 2533 Pennsylvania Avenue, SE, and sought a fine of $500.00 for each violation.

On March 12, 2001, this administrative court received Respondents' timely plea of Deny to the charges along with a request for a hearing. Accordingly, by order dated March 20, 2001, this administrative court scheduled a hearing for April 20, 2001.

B. Notice of Infraction (00-40321)

On April 5, 2001, the Government served a separate Notice of Infraction (00-40321) upon Respondents charging violations of 29 DCMR 311.1 for allegedly prohibiting the inspection of a licensed child development facility; 29 DCMR 326.7 for allegedly maintaining incomplete employee records; 29 DCMR 316.2 for allegedly failing to provide a teacher and an assistant or aide at all times; 29 DCMR 325.13 for allegedly failing to comply with a health requirement for an employee of a child development facility; and 29 DCMR for allegedly failing

to provide a qualified teacher for the two (2) year old group. Except for the violation of 29 DCMR 311.1 which, according the Government, occurred on March 22, 2001, the Notice of Infraction (00-40321) charged that the remaining violations occurred on January 25, 2001 at 2533 Pennsylvania Avenue, SE. The Government sought a fine of $50.00 for the violation of 29 DCMR 326.7, and a fine of $500.00 for each of the remaining violations.

Despite the April 5, 2001 date of service, the Government listed April 20, 2001 as the pre-scheduled hearing date on the Notice of Infraction (00-40321). In so doing, the Government truncated Respondents' statutorily-imposed response time (fifteen (15) days plus five (5) days for service, as in this case, by mail pursuant to D.C. Code §§ 6-2712(e) and 6-2715 (1981 ed.)) and contravened this administrative court's standing order (Office Order 2000-03) which provides that a prescheduled hearing date must be set at least thirty (30) days after the date of service.[1]

C. Government's Motion to Consolidate and Continue Proceedings

On April 10, 2001, this administrative court received the Government's motion to consolidate the Notices of Infraction (00-40362 and 00-40321) and to continue any hearing in the cases. In support of its motion, the Government represented that: "the two NOIs concern an ongoing series of related events, and involve the same parties, witnesses, and documentary evidence." In its motion, the Government acknowledged that the pre-scheduled hearing date of

[1] By subsequent memorandum issued by the OAH Docket Clerk, the thirty (30) day requirement set forth in Office Order 2000-03 has been extended to forty-five (45) days.

April 20, 2001 for Notice of Infraction (00-40321) had been entered erroneously. Accordingly, the Government requested that one hearing on both of the Notices of Infraction be continued until sometime after May 6, 2001.

On April 12, 2001, I issued an order continuing the hearing on Notice of Infraction (00-40362) to June 7, 2001 and permitting Respondents an opportunity to respond to the Government's motion to consolidate. The April 12th Order specifically provided: "should Respondents elect not to respond to the Government's motion as set forth above, Respondents will be deemed to not oppose the Government's motion. Accordingly, the adjudication of Notice of Infraction (00-40321) will be consolidated with Notice of Infraction (00-40362), *as appropriate*, for purposes of the June 7, 2001 hearing . . . " (emphasis supplied).[2] No response was received by Respondents within the allotted time, and, upon granting, in part, a June 5, 2001 motion for a continuance by Respondents, a hearing in these matters was scheduled for June 22, 2001.

D. The June 22, 2001 Hearing

The June 22, 2001 hearing took place as scheduled. Appearing on behalf of the Government was Carmen R. Johnson, Esquire. Appearing on behalf of Respondents was Vandy

[2] As explained to the parties during the June 22, 2001 hearing, Respondents had not answered, and were not required to have answered, Notice of Infraction (00-40321) at the time that the April 12th order was issued. *See* D.C. Code §§ 6-2712(e) and 6-2715 (1981 ed.). Therefore, to the extent any subsequent plea by Respondents to the charges set forth in Notice of Infraction (00-40321) may not have required an in-person hearing, *i.e.*, a plea of Admit or Admit with Explanation, it was potentially inappropriate for consolidation with Notice of Infraction (00-40362) for hearing purposes.

L. Jamison, Jr., Esquire. Zahra Ali, the charging inspector in the case, testified on behalf of the Government. Franceris Proctor and Linda Morrow testified on behalf of Respondents. In addition, the Government placed Petitioner's Exhibit ("PX") 104 into evidence without objection. Respondents did seek to place their previously marked exhibits into evidence, although the Government placed Respondents' Exhibit ("RX") 203 into evidence over Respondents' objection which was overruled.[3]

I noted at the start of the hearing that Respondents had not yet entered a plea to the charges set forth in Notice of Infraction (00-40321) and, as a result, I heard arguments from counsel as to the appropriateness of the consolidation of the Notices of Infraction for hearing purposes. Respondents orally moved to dismiss Notice of Infraction (00-40321) on the grounds that it was facially defective due to the Government's admittedly erroneous entry of the April 20, 2001 pre-scheduled hearing date on the Notice.[4] The Government opposed Respondents' motion and reiterated its request to consolidate the cases largely on the ground that Respondents had ample notice of the error and, by failing to respond to the Government's April 10, 2001 motion to continue and consolidate the cases (as permitted by this administrative court's April 12, 2001 order), Respondents waived any objection thereto.

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[3] Respondents objected to the Government's request that RX 203 be placed into evidence on the grounds that the request was not timely, and there was a lack of foundation. Because the record had not closed, I overruled Respondents' objection as to the timeliness of the request. Respondents' objection as to foundation was later withdrawn.

[4] Due to the facial defect on the Notice of Infraction (00-40321), it was Respondents' position that they had no obligation to enter a plea.

Because Respondents had not answered Notice of Infraction (00-40321) and were now moving to dismiss the charges set forth therein, I ruled that it would be inappropriate to consolidate the cases for purposes of the June 22nd hearing, and directed the parties to proceed only on matters related to Notice of Infraction (00-40362). I also took Respondents' motion to dismiss under advisement, with a ruling to be issued in due course.

II. Respondents' Motion to Dismiss

As discussed above, by setting a pre-scheduled hearing date of April 20, 2001 for a Notice of Infraction (00-40321) served by mail on April 5, 2001, the Government erroneously truncated Respondents' statutorily allotted time to respond to the Notice of Infraction, and contravened a standing order of this administrative court. It is well within this administrative court's discretion to dismiss the Notice of Infraction (00-40321) on these grounds. *See* D.C. Code §§ 6-2712(e) and 6-2715 (1981 ed.); *see also DOH v. Agunyego*, OAH No. C-01-80053 at 5-6 (Final Order, June 8, 2001) (noting failure to comply with express policy and practice dictate of this administrative court will, absent good cause, ordinarily result in dismissal); SCR-Civil 41(b) (dismissal for failure to comply with court rules); *Ramos v. District of Columbia Department of Consumer and Regulatory Affairs*, 601 A.2d 1069, 1073-74 (D.C. 1992) (recognizing inherent authority of administrative tribunals to regulate hearing process); *Ballard v. Carlson*, 882 F.2d 93, 95 (4th Cir. 1989) (recognizing "courts must have the authority to control litigation before them, and this authority includes the power to order dismissal of an action for failure to comply with court orders").

I conclude, however, that a dismissal of Notice of Infraction (00-40321) is not warranted in this case for two main reasons. First, the underlying purpose of the pre-scheduled hearing provision contained in Office Order 2000-03 is to allow the parties and this administrative court sufficient time to process the Notice of Infraction including, if necessary, the preparation for a hearing. In light of the two continuances of proceedings in this matter which together spanned nearly three months – one of which was requested by Respondents -- Respondents obtained more than sufficient time in which to process the Notice of Infraction (00-40321) as well as to prepare the case for a hearing. Indeed, Respondents do not contend otherwise. *See Grimes v. Newsome*, No. 00-CV-115, 2001 D.C. App. LEXIS 198, at *5-9 (D.C. Sept. 13, 2001) (holding that facially invalid landlord's notice to cure or vacate was not invalid *per se* where, despite an incorrect response date listed on the face of the notice, the tenants received more than the statutorily-allotted time in which to respond to the notice). As a result, the purpose of Office Order 2000-03 has been satisfied in this case.

Second, Respondents have suffered no real prejudice as a result of the Government's technical error. The Government served its motion for consolidation and continuance upon Respondents on April 10, 2001, only five (5) days after its service of Notice of Infraction (00-40321). As was expressly stated in that motion: "Petitioner concedes that the proposed hearing date listed on NOI No. 00-40321 does not comport with the requirement that hearing dates be scheduled at least 30 days after the date of service. Petitioner submits that this date was entered in error." Government's Motion to Continue and Consolidate, at 2. Respondents do not suggest that they failed to receive this notice of the Government's error, nor do they dispute that they were expressly provided an opportunity by this administrative court to respond to this or any

other issue raised in the Government's motion, but elected not to do so. Respondents' inaction in this regard undercuts any assertion that they have been unduly prejudiced.

Accordingly, Respondent's oral motion to dismiss Notice of Infraction (00-40321) is denied, and, pursuant to this order, Respondents shall be required to file with this administrative court their plea to the charges set forth in Notice of Infraction (00-40321) within twenty (20) days of the service date of this order.[5]

III. Findings of Fact

Based upon the testimony of the witnesses, my evaluation of their credibility, the documentary evidence admitted at the hearing and the entire record of this matter, I now make the following findings of fact:

Respondent Agape is a Child Development Center[6] located at 2533 Pennsylvania Avenue, SE. At all times relevant to these matters, Respondent Franceris Proctor was an owner of Agape, and served as its Acting Director.

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[5] While Respondents' failure to timely respond to Notice of Infraction (00-40321) could be viewed as a default in accordance with D.C. Code §§ 6-2704(a)(2)(A) and 6-2712(f) (1981 ed.), given the aforementioned defect on the Notice of Infraction, I conclude that such a view would be inequitable. Therefore, as an exercise of this administrative court's discretion, Respondents' response period is hereby tolled, *nunc pro tunc*, from the April 12, 2001 issuance of the Order Regarding Petitioner's Motion to Continue and Consolidate until twenty (20) days after the date of service of this Final Order. *See generally Ramos,* 601 A.2d at 1073-74.

[6] A "Child Development Center" is defined in the applicable regulation as: "a child development facility for more than five (5) children or infants, which provides a full-day (more than four (4) but less than twenty-four (24) hours per day, part-day (up to four (4) hours per day), or before and after school child development program, including programs provided during school vacations." 29

On January 25, 2001, Zahra Ali, Human Services Licensing Specialist for the Department of Health, Health Regulation Administration, inspected Agape at approximately 11:00 AM. This inspection was prompted by an anonymous complaint received by the Health Regulation Administration about Agape's bathroom facilities. Upon inspecting Agape's bathroom facilities that day, Ms. Ali found no violation.

During her inspection on January 25th, Ms. Ali observed five classrooms of children at Agape. According to Ms. Ali, Linda Morrow, who introduced herself to Ms. Ali as teacher at Agape, identified one of the classrooms as containing 2 to 2 ½ year-old children. Ms. Ali observed that there were nine children in this classroom and two adults -- Ms. Morrow and Yvette Taylor who was identified as a teacher's assistant. Ms. Proctor testified that there was no 2 to 2 ½ year old group at Agape, but there was a 2 ½ to 3 year old group. Ms. Morrow testified that her group that day consisted of 2 ½ to 3 year olds. Ms. Proctor testified that she had organized the child groupings at Agape on January 25, 2001.

Based on undisputed documentary evidence, I find that the following nine children were present in the group in question on January 25, 2001:

Child's Initials	**Birth Date**	**Age as of 1/25/2001 (approx.)**

DCMR 399.1. A "Child Development Facility" is defined as a "location where a child development program is provided for infants or children, away from home, for less than twenty-four (24) hours per day for each infant or child. The facility may be known as a child development center, child development home, or infant care center, but does not include a public or private elementary or secondary school engaged [i]n legally required educational and related functions." *Id.* Finally, a "Child Development Program" is defined as: "a program responsive to the stages of physical, emotional, social, and intellectual growth and behavior of infants or children." *Id.*

1.	J.C.	10/8/98	2 yrs. 3 mos.
2.	T.C.	3/22/98	2 yrs. 10 mos.
3.	T.D.	9/26/98	2 yrs. 4 mos.
4.	P.H.	7/3/98	2 yrs. 6 mos.
5.	J.S.	9/23/98	2 yrs. 4 mos.
6.	C.S.	7/17/98	2 yrs. 6 mos.
7.	J.M.	7/20/98	2 yrs. 6 mos.
8.	Za.W.	10/22/98	2 yrs. 3 mos.
9.	Z.W.	10/22/98	2 yrs. 3 mos.

I also find that the group of nine children in question contained eight children in the 2 to 2 ½ year-old range, and contained one child, T.C., in the 2 ½ to 3 year old range.[7] RX 203.

After conducting her inspection of Agape's facilities, Ms. Ali asked Leila Ross Jones, who identified herself as an owner of Agape and is Respondent Franceris Proctor's mother, to inspect Agape's staff records. Ms. Ali did not request the children's records at that time. Ms. Jones provided the requested records to Ms. Ali. Ms. Ali used a vacant table in an area between Agape's reception area and classrooms to conduct her review of the staff records and did not unduly interfere with Agape's operations.

Sometime between 2:00 and 3:00 PM, Ms. Proctor entered Agape, and, upon finding Ms. Ali reviewing the records, asked her to explain why she was there.[8] There is some dispute in the record as to precisely what occurred thereafter. According to Ms. Proctor, Ms. Ali stated that she had been instructed by her supervisor to review Agape's staff files because they were

[7] I note that as of the date of the alleged infractions, January 25, 2001, the children identified as P.H., C.S. and J.M. were all a few days short of 2 ½ years old. RX 203.

[8] Ms. Ali testified that Ms. Proctor returned at approximately 2:00 PM. Ms. Proctor testified that she returned to Agape at approximately 2:55 PM. This one-hour discrepancy between Ms. Ali's and Ms. Proctor's testimony is, however, immaterial for purposes of resolving this case.

"fraudulent." Ms. Ali also requested that Ms. Proctor sign a complaint relating to alleged violations observed during the inspection, but Ms. Proctor refused to sign the document. Based on Ms. Ali's alleged representation that she was finished with the inspection, Ms. Proctor testified that she ordered Ms. Ali to leave the premises. Ms. Proctor testified that she subsequently telephoned Ms. Ware, Ms. Ali's supervisor, to advise her as to what had occurred.

According to Ms. Ali, Ms. Proctor, upon arriving at Agape, immediately ordered her to leave the premises. Ms. Ali testified that, at that time, Ms. Proctor uttered words to the effect of that she had had enough of the Department of Health and did not care what would happen as a result of telling Ms. Ali to leave. Ms. Ali called her office and then left the premises.[9]

The immaterial factual discrepancies notwithstanding, I find that it is material and undisputed in the record that Ms. Proctor told Ms. Ali to leave Agape's premises on January 25, 2001. Moreover, based on a preponderance of the evidence, I find that, as a result of Ms. Procter's telling her to leave the premises, Ms. Ali was unable to complete her inspection of Agape that day.[10] Specifically, Ms. Ali was unable to review Agape's children's records so that the could confirm the ages of the nine children that she believed had been earlier identified by Ms. Morrow as being in the 2 to 2 ½ year-old group.

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[9] I credit Ms. Ali's testimony that, in her experience, it takes on average from four to eight hours to conduct a complete inspection of a Child Development Facility.

[10] I do not credit Ms. Proctor's testimony that Ms. Ali told her that she had finished the inspection. Such testimony is consistent with the undisputed testimony that she asked Ms. Ali to leave the premises, and is also inconsistent with Ms. Proctor's testimony that she called Ms. Ali's supervisor immediately after Ms. Ali departed to explain what had occurred. Had Ms. Ali finished her inspection in the normal course as suggested by Ms. Proctor, it is unlikely that there would have been anything for Respondents to explain so promptly.

IV. Conclusions of Law

A. 29 DCMR 316.1

The Government has charged Respondents with violating 29 DCMR 316.1 on January 25, 2001.[11] 29 DCMR 316.1 provides that the size of any one (1) group of children shall not exceed that specified in the following chart for each age group:

AGE	MAXIMUM SIZE OF GROUP	CHILD-ADULT RATIO
2 years to 2 years, 6 months	8	4 to 1
2 years, 6 months through 3 years	16	8 to 1

. . . .

The Government's only offer of proof of this violation is that, based on what Ms. Morrow told Ms. Ali, Respondents had nine children in Ms. Morrow's group, each of whom was 2 to 2 ½ years old, and were, therefore, subject to the 4 to 1 child-adult ratio. Because the group in question had only two adults on the day of the inspection, the Government contends that Respondents violated 29 DCMR 316.1. The Government concedes, however, that it did not have an opportunity to confirm the ages of the children due to Respondents' actions on the day of the

[11] Because Ms. Proctor testified that she personally had organized the child group in question, she may be held liable for this violation. Ms. Proctor's status as an owner and Acting Director of Agape, without more, does not, however, subject her to liability under 29 DCMR 316.1. *Cf.* 16 DCMR 3201.4 (infraction committed by individual acting as agent, partner, director, officer or employee of person shall be considered to have been committed by person); 29 DCMR 315.2 (responsibilities of Child Development Center Director).

inspection, and that the charge was based upon Ms. Morrow's representation as understood by Ms. Ali.

The undisputed documentary evidence introduced by the Government establishes, however, that only eight of the nine children in Ms. Morrow's group were 2 to 2 ½ years old at the time of the alleged violation. RX 203. Accordingly, the Government has failed to meet its statutory burden of proof, and the alleged violation of 29 DCMR 316.1 must be dismissed. *See* D.C. Code § 6-2713(a) (1981 ed.).

B. 29 DCMR 311.1

The Government has also charged Respondents with a violation of 29 DCMR 311.1 based on Ms. Proctor's admitted ordering of Ms. Ali to leave Agape's premises on January 25, 2001. 29 DCMR 311.1 provides:

> The Mayor and any other duly authorized official of the District having jurisdiction over, or responsibilities pertaining to, any child development facility, after presenting official credentials of identification and authority issued by the District, shall have the right either with or without prior notice, to enter upon and into the premises of any child development facility licenses under this chapter, or for which an application for license has been made, in order to determine compliance and to facilitate verification of information submitted on or in connection with an application for licensure pursuant to provisions of this chapter. The conduct of the authorized official shall be such that the entry and inspection shall take place with the least possible disruption to the program.

Respondents contend, in essence, that that their ordering Ms. Ali to leave Agape's premises on January 25, 2001 did not violate 29 DCMR 311.1 because: (1) Ms. Ali's inspection went beyond the scope of the anonymous complaint about Agape's bathroom facilities; (2) Ms. Ali had more than sufficient time to complete her inspection; and (3) Ms. Ali never requested the children's records.

Respondents' arguments are unpersuasive. First, the only qualification on the permissible scope of an inspection under 29 DCMR 311.1 is that the inspection be performed to "determine compliance and to facilitate verification of information submitted on or in connection with an application for licensure . . . ." Ms. Ali's inspection was clearly within that scope. Second, Ms. Ali testified that, on average, an inspection of a Child Development Center takes her from four to eight hours, and I credit her testimony on this point. Ms. Ali's inspection of Agape on January 25, 2001 was well within that range of time. Moreover, as a highly regulated entity, it is simply not within the purview of a Child Development Center to impose its own time limits on a Government inspection lawfully conducted pursuant to 29 DCMR 311.1. *See, e.g., Rush v. Obledo* 756 F.2d 713 (9th Cir. 1985) (upholding broad authority for administrative searches of businesses providing care and supervision to children).

Finally, although the evidence establishes that Ms. Ali had not requested Agape's children's files, the evidence also establishes that, as part of her inspection, she elected to review those files. By ordering Ms. Ali off Agape's premises, Respondents unlawfully prevented that review. Given what is at stake, *i.e.*, the health and welfare of children, the prevention of the inspection of a Child Development Center is a "very serious matter." *DOH v. Jewels of Ann*

Private School, OAH No. I-00-40204 at 9 (Final Order, June 29, 2001). As this administrative court recently noted:

> With respect to 29 DCMR 311.1, the regulation at issue is a key part of a regulatory scheme to protect children from reasonably avoidable risks in a childcare setting. Respondents, as licensees in a regulated business, bear the burden of avoiding unsafe and illegal conditions. The process of subjecting a business to regular state-sponsored inspections is a critical component of a governmental health and safety compliance program. In electing to provide services in a highly regulated industry such as childcare, a licensee must make its facility open and accessible to all necessary inspections. . . . An inspector's inability to promptly inspect a facility places the health and safety of the children at heightened risk from undiagnosed and uncorrected dangers . . . .

Id. at 9-10. Accordingly, Respondents are liable for violating 29 DCMR 311.1 on January 25, 2001. A fine of $500.00 will be imposed for that violation. 16 DCMR 3222.1(f).

V. Order

It is, therefore, this _____ day of _____, 2001:

ORDERED, that Respondents' motion to dismiss Notice of Infraction (00-40321) is hereby **DENIED**, and **Respondents are hereby required to enter their plea to Notice of Infraction (00-40321) no later than twenty (20) calendar days after the service date of this Order**, the statutory response period having been tolled, *nunc pro tunc*, from April 12, 2001 as set forth herein; and it is further

ORDERED, that the charge of Respondents' violation of 29 DCMR 316.1 as set forth in Notice of Infraction (00-40362) is hereby **DISMISSED**; and it is further;

ORDERED, that Respondents are hereby held jointly and severally liable for violating 29 DCMR 311.1 as set forth in Notice of Infraction (00-40362). Respondents shall pay a total of **FIVE HUNDRED DOLLARS ($500.00)** in accordance with the attached instructions within twenty (20) calendar days of the date of mailing of this Order (fifteen (15) calendar days plus five (5) days for service by mail pursuant to D.C. Code § 6-2715 (1981 ed.)); and it is further

ORDERED, that, if Respondents fail to pay the above amount in full within twenty (20) calendar days of the date of mailing of this Order, by law, interest must accrue on the unpaid amount at the rate of 1 ½% per month or portion thereof, beginning with the date of this Order. D.C. Code § 6-2713(i)(1) (1981 ed.), as amended by the Abatement and Condemnation of Nuisance Properties Omnibus Amendment Act of 2000, D.C. Law 13-281, effective April 27, 2001; and it is further

ORDERED, that failure to comply with the attached payment instructions and to remit a payment within the time specified will authorize the imposition of additional sanctions, including the suspension of Respondent's licenses or permits pursuant to D.C. Code § 6-2713(f) (1981 ed.), the placement of a lien on real or personal property owned by Respondents pursuant to D.C.

Code § 6-2713(i) (1981 ed.) and the sealing of Respondents' business premises or work sites pursuant to D.C. Code § 6-2703(b)(7) (1981 ed.).

/s/ 10/29/01

Mark D. Poindexter
Administrative Judge